



Unabomber

SACRAMENTO, CALIFORNIA
FRIDAY, JANUARY 9, 1998, 4:00 P.M.

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THE CLERK: Calling criminal case 96-259; United States versus Theodore Kaczynski.

THE COURT: Please state your appearances for the record.

MR. CLEARY: Robert Cleary, Steve Lapham, and Stephen Freccero for the government.

THE COURT: Thank you.

MS. CLARKE: Judy Clarke, Quin Denvir, and Gary Sowards on behalf of Mr. Kaczynski.

THE COURT: Who is present.

MS. CLARKE: Who is present.

THE COURT: Thank you. Yesterday I asked you to meet and confer to see if you can agree on a psychiatrist to conduct a study and an examination of Mr. Kaczynski to determine his competency to stand trial. I asked you to contact my chambers about your efforts by noon. No one contacted me about that matter. Perhaps you didn't contact me

because of the directive I had my deputy clerk give you which basically told you that we were going to have this hearing.

When I gave that directive, I thought Mr. Kaczynski should know that if he failed to cooperate with the competency

examinations, as he stated yesterday, that I would immediately

send him to be examined by physicians, or I should say psychiatrists, at the Bureau of Prisons.

This morning, I personally explored how long it would take the Bureau of Prisons to conduct such an examination and where the examination would take place. As I was speaking to the Bureau of Prisons personnel, I requested whether there was

any way the Bureau of Prisons could provide an expedited examination in the unique situation we are experiencing in this case where we have selected a jury and desire to finish the trial proceedings. In essence, the trial has commenced in this case.

Eventually, I received assurance from the Bureau of Prisons that a psychiatrist working at the federal correction institution located in Butner, North Carolina, could commence the examination on Monday, and that if Mr. Kaczynski is cooperative, the examination could be completed by Friday. And if typing service is available, the report could be prepared about two hours after the examination is completed.

My inclination is to issue an order that Mr. Kaczynski be examined by the Bureau of Prison's physicians and others authorized to conduct such an examination needed to assist in the examination and the study of his mental capacity to stand trial.

The order would authorize the examining physicians to access all pertinent medical and collateral information, including psychiatric and medical reports and psychological testing. It would also authorize transporting Mr. Kaczynski to the federal correction institute located at Butner, North Carolina, or to any other designated federal psychiatric institution for the examinations, by oral directive, meaning that if Mr. Kaczynski is still providing assurance that he will cooperate locally, the examination will occur locally. And if he does not cooperate, then I will issue an oral directive, and he will immediately be transported to a

federal psychiatric institution where the examination will be completed. I will authorize the examination for the amount of time that is authorized under law, which is 30 days.

I know I received a proposed order from the defense, I think about 15 or 20 minutes before I took the bench. It came too late. I did extensive work communicating with Bureau of Prison personnel, and I am very appreciative that the United States Bureau of Prisons will do what they've indicated they will do. And I have already written an order that effectuates what I've just said. And the order is signed and is on the bench with me.

I will listen to you, but I doubt very seriously if you can change my opinion. But I'm open for your position at this moment.

MR. DENVIR: Can we have a moment, your Honor?

THE COURT: Yes.

MR. CLEARY: Your Honor, from the government's perspective, we have no objection to proceeding along the lines you're suggesting.

THE COURT: Okay.

MS. CLARKE: May I just have one point of clarification so that we can discuss it with Mr. Kaczynski? It's to be a local examination unless there is a failure to cooperate?

THE COURT: Correct. It's my understanding -- I will state it, because I know that there is a marshal in the courtroom who is aware of the situation because I had the marshal check with the local jail. It's my understanding the examination can be conducted in the jail where he is now located.

MS. CLARKE: And that would be the Court's intention?

THE COURT: That is my intention, provided he is going to cooperate. If he's not going to cooperate, he will be on a plane, and I will fly him to a psychiatric institution immediately.

MS. CLARKE: We understand that.

THE COURT: Okay.

MS. CLARKE: Can we have just one moment?

THE COURT: Sure.

(Off-the-record discussion between defense counsel and the defendant.)

MS. CLARKE: Your Honor, we really believe that this is a call for the Court to make, and we respect the Court's decision and have no objection to that. It is our firm belief

that Mr. Kaczynski will cooperate with that competency evaluation and will do so locally.

THE COURT: Okay. The order that I have created basically authorizes an oral directive by me to tell the marshal to transport him wherever I believe he should be examined if he does not cooperate. And if I receive word that

he has not cooperated, I will issue the order.

MS. CLARKE: Would the Court be notifying us or would the Bureau of Prisons be notifying us of the identity of the examining physician so that we can talk to Mr. Kaczynski and tell him when that would begin and who they are?

THE COURT: I believe that the examining physician will be Dr. Sally Johnson. She is making arrangements to come to Sacramento. She will be prepared to commence the examination, perhaps first thing Monday.

That raises a question as to whether you have information you want to give to Dr. Johnson. Do you have medical reports and other information you want to give to Dr. Johnson?

She obviously needs to have all the medical reports. We know that. This is what I'm doing. Here's my order. I will direct that my deputy clerk file it as soon as feasible today. I have copies for the parties. Attached to the order is a copy of the indictment so that Dr. Johnson is aware of the allegations involved in the case. I want my deputy clerk to inform my secretary that I want the order faxed to Dr. Johnson at this very moment.

MR. CLEARY: Your Honor, the government does have some medical reports. And anything else we have, we'd make available to Dr. Johnson. I guess the one thing we have to think about is to what extent the Court wants us to open our files to Dr. Johnson. In other words, do we want to show the cabin documents and that sort of thing? I imagine we would just leave that up to Dr. Johnson.

THE COURT: That's my thought. She obviously needs the medical reports.

MR. CLEARY: Right. And we would provide that. And whatever else we have of that nature, we would provide to her immediately.

The Court's understanding is she will be here on Monday?

THE COURT: The individual that you can give all the information to is right behind you. Chief Deputy Mike Nelson knows how to contact Dr. Johnson. And if you make arrangements with Mr. Nelson, he will get all of that information to Dr. Johnson. In fact, he can provide Dr. Johnson with the information as early as Sunday.

We're done with that matter; right?

I'm now going to comment on another matter. After we completed all court proceedings yesterday, United States Marshal personnel informed me that they received an allegation

that Mr. Kaczynski attempted suicide presumably the evening before the January 8 hearing.

Obviously, as the trial judge, I have a keen interest in knowing about such allegations, especially when I'm engaged in

a competency proceeding. I recognize the difficult job the United States Marshal has in trying to keep judges from being exposed to mere rumors that have no substance to them, but the

upshot of what I'm telling you is I knew nothing about the allegations when we were proceeding yesterday.

Under Ninth Circuit law, as you will see when you read my order, those allegations are significant to a determination

of the competency issue. I indicate in my order that under Ninth Circuit law, the conclusion is inescapable that if you have that type of an allegation, combined with the other matters that took place in my courtroom yesterday, I believe firmly that the judge is mandated to do exactly what I did.

There was another question concerning what do we tell the jurors. Before we do that, we probably need to figure out

the timetable that's involved here. If we receive, as Dr. Johnson has indicated, the report of the examination on Friday, everything happens as planned, then the question is whether we can schedule the competency hearing right now. Because in theory, the competency hearing could take place that following week.

This is what I've already told the jurors through my staff. I told my staff to tell the jurors that they will not be meeting next week, because I knew that the examinations would consume all next week. I figure that I can work on the order that I believe the defense provided concerning prospective communications to the jurors. We can do that during this hearing, and what I can do is turn this into a regular order.

I need to get your input before I communicate with the jury. It's clear error if the judge doesn't do that if it involves a significant matter. So we will clarify this. We need to clarify the timetable first so that I can figure out what to tell the jurors, and it seems that we should be able to schedule the competency hearing at this very moment.

MR. CLEARY: Your Honor, how about the following business day after the report's due? The report would be on the 16th, Friday the 16th. Have the hearing on the 20th. Monday is a federal holiday. Tuesday the 20th for the hearing.

THE COURT: What do you envision being presented at the hearing?

MR. CLEARY: It's difficult to predict, your Honor, not knowing what the report is, because it could be as simple as the submission of the report from Dr. Johnson and both sides accepting the findings in Dr. Johnson's report. It could, on the other hand, be a contested report in which one side or the

other takes the position that Dr. Johnson's findings are erroneous, in which case I imagine Dr. Johnson would have to testify and both sides would direct and cross-examine her.

THE COURT: So you are indicating that we need to determine if Dr. Johnson is available for a personal appearance on the 20th?

MR. CLEARY: That's correct, your Honor.

THE COURT: Would there be any other witnesses other than Dr. Johnson?

MR. CLEARY: None from the government, your Honor.

MR. DENVIR: Your Honor, we would ask that the Court schedule the competency hearing for the following Wednesday to allow us time to react to the report. As to whether there would be merely the submission of the report, whether there would be a need for Dr. Johnson to even appear, whether there would be other witnesses, I think, would depend on the report itself. And we would notify the Court on the first business day after we have it what we think is necessary. It may very well be that the parties will just submit it on the written report.

THE COURT: I'm not sure that I am following what you're stating, because you're indicating that we should schedule the hearing for the 21st rather than the 20th.

MR. DENVIR: If that's a Wednesday, yes, your Honor.

THE COURT: And that you will let me know something the first business day after receiving the report, which would be Tuesday.

MR. DENVIR: Tuesday morning.

THE COURT: That's not going to work, because Dr. Johnson has to fly here. I mean, unless she's going to stay here, she'd have to fly here from North Carolina. And I assume she has to make travel plans. I don't know if she can get here that fast. Because you would let me know on the 20th

basically of her need, and then she would have to make arrangements to get here by the 21st.

MR. DENVIR: Would the Court prefer to put the hearing over to Thursday and we could notify you on Tuesday? I don't know when we will receive it on Friday. We will need some opportunity to review it and review it with Mr. Kaczynski. It

may very well be that both sides feel that it can be submitted

on a written report without Dr. Johnson appearing and without further evidence. I just can't anticipate.

THE COURT: I understand. I know that. Okay. I think that's what we'll have to do. We'll have to schedule it for the 22nd. I need to have the marshal, Mr. Nelson, communicate that fact to Dr. Johnson.

If there's a problem with that, you can let me know. What time on the 22nd?

MR. CLEARY: Whatever is convenient for the Court.

MR. DENVIR: Convenience of the Court.

THE COURT: I'm wondering if we shouldn't do it at 8:00 o'clock, because if there's no problem with the report, we can do the trial. 8:00 o'clock.

MR. CLEARY: Your Honor, the only potential problem with that is that would require summoning the jury for that morning.

THE COURT: I know.

MR. CLEARY: And if there is a problem with the hearing, then we may have the jury stuck waiting here and we send them home.

THE COURT: I'm asking these questions so that we can figure out how to communicate with the jury. I think the jury should be placed on standby status in my order so that they know they may very well have to appear for the trial on the 22nd. I want to look at the proposal submitted by the defense. I want to see if we can finalize it right now.

MS. CLARKE: Regarding the jury?

THE COURT: Correct.

MS. CLARKE: Your Honor, that actually was a joint proposal.

THE COURT: Was it?

MS. CLARKE: Yes.

THE COURT: Okay. Well, the thing that is a little bit troubling, but I can understand why you did it, the judge has taken fault for the delay. I did that, and I did that publicly, but it was not really my fault.

MR. DENVIR: It's okay to blame the government, your Honor.

THE COURT: I'll read this. If you could read along with me. I don't think we need to say anything about fault again because I told them.

I have no changes to the first sentence which states -- I need to think about this for a moment, though, because if it's going to be an order, I may have to revise portions of it.

How about this. I will set forth at the very top "ladies and gentlemen," and then state "we are still involved in proceedings which are necessary under the law in this case which will delay the start of this jury trial."

I don't think we need the part that's bracketed. I will delete that.

Is that all right?

MR. DENVIR: Yes, your Honor.

MR. CLEARY: That's fine.

THE COURT: Okay. And then "at present, we anticipate that these proceedings will be resolved no later than January 22." I'm going to change the language. I'll say "but it is possible that the trial could commence by January 22." I'll state what you have there, except I'll modify it slightly. "If there is to be a later start, you will be notified." And then everything else that you have.

I'll read it for the record so the public knows.

"The Court and the parties appreciate your patience. Please remember the admonition to avoid all news media accounts and discussions with others about the case." And then I'll sign it, and it will be an order.

Is that approved?

MR. CLEARY: Yes, it is, your Honor.

MR. DENVIR: Yes, your Honor.

THE COURT: Have we covered everything?

MR. CLEARY: I believe we have, your Honor.

THE COURT: How about the report? My order says the report is sealed. What's the parties' reaction on that? The report that Dr. Johnson will prepare.

You can look in my order. You have a copy of it, I think. I don't any more. Did I not have my deputy clerk give

it to you? Let me have the original.

I'm going to read this portion just in case there's an objection to it, and then the objecting party can take issue with it. I will read the last paragraph. Again, this order will be made available to the public immediately following this hearing.

"It is further ordered that such study and examinations may be conducted for a reasonable period but not to exceed 30 days and that a report be prepared pursuant to the provisions of Section 4241(b) of Title 18 and filed with the Court under seal."

And then I have a footnote which explains my opinion on it. This is how the footnote reads.

"This document is not the type which has historically been open to inspection by the press and the public, and public access would not play a significant positive role in the functioning of the particular process in question."

And then I cited cases in which other courts have sealed such documents.

MR. DENVIR: We agree with the Court's analysis, your Honor. We would ask that it be sealed.

MR. CLEARY: We have no objection, your Honor, but I assume both parties will get copies of the report; right?

THE COURT: Right.

MR. CLEARY: No objection.

THE COURT: I don't think we covered by what time; what hour you would let me know your position on the report. You will receive the report on Friday.

MR. DENVIR: Your Honor, we would ask the Court to allow us until noon on Tuesday. We will meet that deadline this time.

MS. CLARKE: As long as the Court doesn't confuse us.

THE COURT: Is that okay with the government?

MR. CLEARY: Yes, it is, your Honor. Thank you.

THE COURT: Is there anything further to cover?

MR. DENVIR: No, your Honor.

No, your Honor.

THE COURT: Thank you.

(Court adjourned.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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BEFORE THE HONORABLE GARLAND E. BURRELL, JR., JUDGE

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UNITED STATES OF AMERICA,)

)
Plaintiff,)

)

vs.) No. Cr. S-96-259 GEB

)

THEODORE JOHN KACZYNSKI,)

)

Defendant.)

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